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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO LISEA, Defendant and Appellant.	C067767 (Super. Ct. No. SF111155A)

APPEAL from a judgment of the Superior Court of San Joaquin County, George J. Abdallah, Jr., Judge. Affirmed.

Randy S. Kravis, under appointment by the Court of Appeal; and Michael E. Platt for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of all of parts I., II., IV., and V. of the Discussion.

After an initial jury deadlocked, a second jury, upon retrial, convicted defendant Eduardo Lisea of attempted murder, assault with a firearm, and criminal street gang participation, but acquitted him of permitting another to shoot from a vehicle. (Pen. Code, §§ 664/187, subd. (a), 245, subd. (a)(2), 186.22, subd. (a), and 12034, subd. (b), respectively.)[1] The jury also found true some gang enhancements, but found not true that defendant had personally used or discharged a firearm. Defendant was sentenced to state prison for 32 years to life.

The prosecution's main theory was that defendant—during a confrontation between his gang and a rival gang that resulted in the shooting of an innocent bystander—aided and abetted the offenses specified above, which were the natural and probable consequence of the offenses he had committed, disturbing the peace or simple assault.

In the published portion of this opinion, we conclude that defendant, as a convicted aider and abettor of the attempted murder under the natural and probable consequences doctrine, is a "principal" within the meaning of the section 12022.53, subdivision (e)(1) (hereafter section 12022.53(e)(1)) 25-year-to-life gang firearm enhancement. (§ 12022.53, subds. (a)(1), (18), (d) & (e)(1).)

In the unpublished portion of this opinion, we examine defendant's other challenges and find no basis for reversal. Those challenges focus on the natural and probable consequences doctrine, the evidence that a rival gang member may have been the shooter, and the trial court's failure to instruct on self-defense and on attempted voluntary manslaughter based on imperfect self-defense or heat of passion. Accordingly, we shall affirm the judgment.

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[1] Undesignated statutory references are to those sections of the Penal Code in effect at the time of defendant's 2008 crimes, unless otherwise indicated.

FACTUAL BACKGROUND

On May 9, 2008, members of the Sureños and Norteños street gangs clashed in the parking lot of a Stockton grocery store, resulting in an innocent bystander, then 18-year-old Christopher Smith, being shot in his right eye.

Independent Witness Accounts

The confrontation actually began inside the store when defendant, a Sureño, made provocative comments and threw gang signs to two Norteños members, Jonathan Pimentel and Billy Ray Cook, amid Pimentel's display of colors (red).

The confrontation continued into the parking lot, with Cook shouting at defendant and his companions. Both groups then pushed shopping carts at one another. A bystander, referring to defendant's group, yelled "They have a gun." After this utterance, Pascual Pimentel (Jonathan's father and a member of the Norteños group) displayed a "Norte" tattoo to defendant and his crew.[2]

Two witnesses—N.D. (the victim Christopher Smith's then nine-year-old brother) and Justine Tango—saw Pascual run to a green SUV, grab a gun (Tango was not sure what was grabbed), and apparently run back to the altercation; shortly after this, these two witnesses heard three gunshots from positions of cover. Three other witnesses—Cynthia Stolt, Melissa Langford and Albert Harps—supported this account; these three witnesses, again, heard but did not see the firing. Another witness, Deyanira Andrade, saw Pascual run by her car and later heard three gun shots in rapid succession (although Andrade believed the shots came from the area in which defendant's group was congregating—she never actually saw a gun).

Four other witnesses—then 12-year-old A.H., Jesus Lomeli, Jose Lomeli, and the victim himself, Christopher Smith—saw gunshots being fired toward the Norteños group

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[2] Because they share the same last name, we will refer to Jonathan and Pascual Pimentel by their first names.

at the front of the grocery store from defendant's blue Chevy pickup truck as it drove from the scene.

Finally, Juan Trejo saw the two groups arguing in the parking lot, and heard one of the arguers say, "Let's get out of here . . . . They have a cuete [Spanish for gun] in the truck." Trejo and his companion, Carlos Chitiva, later saw a man, who was wearing a red shirt, running through the parking lot alongside a Chevy pickup holding one hand in his waistband (as if he had a gun) and cursing. They both heard several rapid gunshots, which came from the parking lot behind them (they were facing the store).

Physical Evidence

The hands of Cook, Pascual, and Jonathan (i.e., the Norteños members) tested positive for gunshot residue.

Two possible bullet strikes were found on the exterior front wall of the grocery store. Nearby, a mushroomed bullet (consistent with having hit a wall) was found; this bullet matched a bullet fragment removed from victim Smith's head—both were fired from the same gun, a .32 caliber.

About a month before the shooting, police officers found two bullet shell casings in defendant's Chevy pickup truck: a .32-caliber casing in the pickup bed, and a nine-millimeter casing in the driver's door pocket.

Defendant's Statements and Gang Evidence

In a police interview, defendant initially denied that anyone had fired a gun from his truck. Eventually, though, defendant said that as he pulled his truck out of the parking lot, two or three Norteños chased after the truck on foot and reached into their clothing as if they were concealing something. After defendant turned right (apparently in exiting the lot), one of his passengers, "Cornejo," fired at the Norteños from the middle of the front seat. Cornejo fired more than two shots. Defendant grabbed Cornejo's arm,

trying to stop the firing and calm Cornejo. When they returned to defendant's house, defendant confronted Cornejo about the shooting.

In his trial testimony, defendant stated that he, Eric Espinoza, and Jose Pineda drove to the grocery store in his mother's 2006 Chevy/GMC truck. The altercation outside the store occurred, with the other group as the aggressor, pushing shopping carts and making threats. In response, Espinoza flashed a pocket knife to ward them off. Defendant, Espinoza and Pineda climbed into defendant's truck and drove off; they did notice, however, that Pascual was running after them holding a gun at his waist. Pascual was about 55 to 60 feet away. Defendant did not slow down, he was "panicked"; his friends were screaming to step on the gas because "[Pascual] has a gun," and he ducked down as he drove. Defendant did not hear any gunshots. Defendant, however, did not tell the police in his interview this specific information about Pascual, although he was asked if he had seen anyone with a gun or anyone shooting.

Based on a variety of factors, two police gang experts opined that defendant was a Sureños gang member on the date of the offense, and they provided a context to this gang confrontation.

DISCUSSION

I. The Trial Court Properly Instructed on the Natural and Probable Consequences Doctrine, and Defendant's Conviction for Street Gang Participation (§ 186.22, subd. (a)) Is Also Legally Proper*

A. Instruction on Natural and Probable Consequences Doctrine

Defendant contends the trial court, on its own, should have tailored the standard instruction it gave on the aiding and abetting doctrine of natural and probable consequences, CALCRIM No. 403, to instruct the jurors specifically that they could not

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* See footnote, *ante*, page 1.

find defendant guilty under that doctrine if they concluded that one of the rival gang members (i.e., one of the Norteños) shot Christopher Smith. We disagree.

As explained by our state high court, the natural and probable consequences doctrine constitutes a particular kind of aiding and abetting. "[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime [i.e., the target offense]. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that [objectively] was a "natural and probable consequence" of the crime aided and abetted [i.e., the non-target offense].' " (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*), quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 260 (*Prettyman*); *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).)

The trial court instructed with CALCRIM No. 403 as relevant:

"Before you may decide whether the defendant is guilty of the charged offense(s) in counts 1 through 4 [i.e., the attempted murder of Christopher Smith; the attempted murder-related firearm assault upon Smith; permitting another to shoot from a vehicle; and street gang participation], which will be referred to in this instruction as the non-target offenses, you must decide whether he is guilty of Disturbing the Peace [by fighting, challenging to fight, or offensive words] and/or Simple Assault which shall be referred to as the target offenses.

"To prove that the defendant is guilty of the charged non-target offenses, the People must prove in counts 1 through 4 that:

"1. The defendant is guilty of Disturbing the Peace . . . and/or Simple Assault, the target offenses;

"2. During the commission of Disturbing the Peace . . . and/or Simple Assault[,] a coparticipant in that Disturbing the Peace . . . and/or Simple Assault committed the crimes charged in counts 1 through 4, the non-target offenses;

"AND

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the charged non-target offenses in counts 1 through 4 was a natural and probable consequence of the commission of the target offenses Disturbing the Peace . . . and/or Simple Assault.

"A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. . . . If the non-target offenses charged in counts 1 through 4 were committed for a reason independent of the common plan to commit the target offenses, then the commission of non-target offenses charged in counts 1 through 4 were not a natural and probable consequence of the target offenses Disturbing the Peace . . . and/or Simple Assault . . . ."

Defendant claims the natural and probable consequences doctrine applies only if the perpetrator of the non-target offense is a "confederate"—rather than a "coparticipant"—of the defendant's. Defendant argues that the jury could have read the term "coparticipant" in the CALCRIM No. 403 instruction as including the actions of a rival gang member in this gang confrontation. Given the evidence that a rival gang member was the shooter (i.e., Pascual Pimentel), defendant argues that he, defendant, could have been improperly convicted of the non-target offenses, with Pimentel as the shooter rather than one of defendant's confederates.

Ambiguities in jury instructions generally warrant reversal only if there is a "reasonable likelihood" the jury misunderstood and misapplied the instructions. (*People v. Avena* (1996) 13 Cal.4th 394, 417.) That is not the case here.

As given by the trial court, CALCRIM No. 403 repeatedly distinguished between defendant's target offenses (disturbing the peace and/or simple assault), and the non-target offenses with which he was charged. Under CALCRIM No. 403, the jury could find defendant guilty of those non-target offenses only if the jury found that defendant committed the target offenses and a *coparticipant in defendant's target offenses* committed the *non-target offenses* as a natural and probable consequence thereof. Under CALCRIM No. 403, the terms "target" and "non-target" were naturally directed at defendant and his group, rather than the rival group. Along similar lines, CALCRIM No. 403 explained that if the non-target offenses were committed for a reason independent of "the common plan to commit" the target offenses, then the non-target offenses were not a natural and probable consequence of the target offenses. Again, this explanation is naturally directed at defendant and his group, rather than the rival group.

Furthermore, CALCRIM No. 403 was given in the context of an instruction on the general principles of aiding and abetting (CALCRIM No. 400). In a gang confrontation, a gang member such as defendant does not *aid* or *abet* (i.e., encourage, assist or support) a *rival* gang member. Instead, he does just the opposite.

Defendant counters by noting the jury did not find true the two enhancement allegations that he personally used or that he personally discharged a firearm, and, more importantly, acquitted him of the offense of permitting another to shoot from his truck. From this, defendant argues the jury likely concluded that one of the Norteños was the shooter, and used this conclusion to convict defendant under the "coparticipant" language of CALCRIM No. 403. We disagree.

First and foremost, an acquittal on one charge does not affect the remaining charges—there are many possible reasons for an inconsistent verdict, including lenity. (See *People v. Brown* (1985) 174 Cal.App.3d 762, 769.)

Second, the two enhancement findings defendant relies upon are consistent with aiding and abetting the shooting (with one of defendant's own gang members as the shooter), based on the natural and probable consequences doctrine of committing the simple assault or disturbing the peace. And to convict defendant of the offense of permitting another to shoot from his vehicle (§ 12034, subd. (b)), the jury, as it was properly instructed, had to find that defendant not only *permitted* the shooting but *knew that he was permitting* the shooting. (CALCRIM No. 969.) Given the relatively weak evidence here that defendant *knowledgeably permitted* one of his fellow Sureños to shoot from his truck—as opposed to the Sureño shooting being a natural and probable consequence of the assault-related offenses comprising this rival gang confrontation—it is not surprising that the jury acquitted defendant on the permitting-shooting offense.

We conclude there is not a reasonable likelihood the jury misunderstood or misapplied CALCRIM No. 403 as given by the trial court.

B. Street Gang Participation Conviction (§ 186.22, subd. (a))

In a related vein, defendant contends his conviction for street gang participation (§ 186.22, subd. (a)) must be reversed because it was legally inadequate on two grounds.

First, defendant argues, this offense requires willfully promoting felonious conduct (*People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*)), but he willfully promoted only the misdemeanor conduct of simple assault or disturbing the peace. This argument shows defendant is still refusing to acknowledge the legally adequate theory that, in the context of this gang confrontation, he aided and abetted attempted murder and firearm assault as a natural and probable consequence of his assaultive behavior. Consequently, he willfully promoted felonious conduct.

And, second, defendant notes the offense of street gang participation requires willfully promoting felonious conduct by *one's own gang*. (*Albillar*, *supra*, 51 Cal.4th at p. 56.) He argues that since the jury found him not guilty of permitting another to shoot from his truck, it is likely the jury concluded that the shooter was one of the rival Norteños, probably Pascual Pimentel. If this is so, defendant continues, then he did not willfully promote felonious conduct of his own gang. For the reasons just expressed in subheading A. of this part, *ante*, we reject this argument as well.

II. Sufficient Evidence Supports Defendant's Convictions for Attempted Murder and the Related Firearm Assault Under the Natural and Probable Consequences Doctrine*

Defendant contends that his convictions for attempted murder and the related firearm assault were not only legally inadequate under the natural and probable consequences doctrine (see above), but factually inadequate too, with insufficient evidence showing these two offenses were the natural and probable consequence of the altercation in front of the grocery store. We disagree.

In reviewing the sufficiency of evidence in a criminal appeal, we review the whole record in the light most favorable to the judgment and determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find defendant guilty beyond a reasonable doubt. (*People v. Bolden* (2002) 29 Cal.4th 515, 553.)

Defendant argues that the gang confrontation here did not involve a preshooting physical altercation or fight, in contrast to cases which have concluded that a shooting was a natural and probable consequence of a preceding gang confrontation. (See, e.g., *Medina, supra*, 46 Cal.4th at pp. 916, 920-921; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 5, 10-11 (*Gonzales*); *People v. Montes* (1999) 74 Cal.App.4th 1050,

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* See footnote, *ante*, page 1.

1053, 1056; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.) Defendant maintains the confrontation here encompassed only the display of gang signs, the exchange of gang words, and the pushing of shopping carts.

Viewed in the light most favorable to the judgment, the evidence showed more than this. To start with, the shopping carts were not being pushed dutifully into their retrieval bins in the parking lot, but into gang rivals in a violent way. According to defendant himself, this menacing behavior prompted one of his confederates to respond by flashing a knife. Furthermore, two witnesses described the two groups as actually fighting. And, although expressed in self-serving testimony, the Pimentels and another person with them (a non-gang individual) claimed that someone from defendant's group threatened to shoot them if they did not leave. One of the independent witnesses, referring to defendant's group, yelled, "They have a gun." Another witness heard a gang member say, "Let's get out of here . . . . They have a cuete [i.e., a gun] in the truck [defendant had a truck]."

In his police interview, defendant conceded that someone in his group probably had a gun, and he testified that Sureños are commonly armed with firearms. At trial, defendant added that the Sureños and the Norteños were at "war" and that they shoot at one another.

The police gang experts echoed this testimony. In Stockton, the Sureños and Norteños were at "war." Both were known to be armed. Both gangs were under "marching orders" to take out the other, and they "shoot each other on sight." In fact, about a month before this incident, police contacted defendant as he was leaving a funeral for "Snappy," a Sureño who had been felled by a Norteño.

Defendant once again turns to the jury findings exculpating him on personal firearm use, and to the evidence indicating Pascual Pimentel was the shooter. As for these findings, we have previously debunked their exculpatory significance to defendant.

As for this evidence, to put it most succinctly, the witnesses supporting Pascual as the shooter "heard" the gunshots, while the witnesses supporting a member of defendant's group as the shooter "saw" the firing; and, as the People pithily put it, "Pascual had no targets in front of the store [where the physical evidence showed the shots were directed]; only the Sureños did."

We conclude the evidence is sufficient to support defendant's convictions for attempted murder and the related firearm assault under the natural and probable consequences doctrine. [END OF NONPUB. PTS. I. & II.]

III. The 25-Year-to-life Enhancement Under Section 12022.53(e)(1) Is Legally Authorized Because Defendant Was a Principal in the Attempted Murder

Defendant contends that his enhancement sentence of 25 years to life under section 12022.53(e)(1) must be reversed because the jury may have found him only vicariously liable for the qualifying offense of attempted murder under the natural and probable consequences doctrine, and therefore he cannot be deemed a principal in that offense. We disagree.

We conclude that the term "principal" in section 12022.53(e)(1) includes aiders and abettors under the natural and probable consequences doctrine. As we shall explain, three reasons underlie our conclusion: California law has long recognized that aiders and abettors are principals; California law has long recognized that aiders and abettors include those acting under the natural and probable consequences doctrine; and such a conclusion furthers the purpose of the section 12022.53(e)(1) enhancement to counteract the serious threat to Californians posed by gang members using firearms.

We start our analysis with the relevant language of section 12022.53(e)(1):

"The enhancements provided in this section [including the subdivision (d) enhancement of 25 years to life for personally and intentionally discharging a firearm

causing great bodily injury or death] shall apply to any person who is a principal in the commission of an offense [i.e., the serious felony offenses enumerated in section 12022.53, subdivision (a), which include attempted murder] if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [i.e., committed the section 12022.53-enumerated offense for the benefit of a criminal street gang with the specific intent to further criminal conduct by gang members]. [¶] (B) Any principal in the [enumerated] offense committed any act specified in subdivision . . . (d)."

Defendant in effect concedes that he meets all the criteria for this enhancement if, under the law, he is deemed a "principal" in the attempted murder offense as an aider and abettor under the natural and probable consequences doctrine. He is.

Since 1872, the term "principal" has been defined in California statutory law, as relevant here, as including "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (§ 31.) California statutory law has also stated, since 1872 as well, "The parties to crimes are classified as: [¶] 1. Principals; and, [¶] 2. Accessories [after the fact]." (§ 30; see also § 32; *People v. Talbott* (1944) 65 Cal.App.2d 654, 660-661 ["A defendant in a criminal action therefore is convicted as a principal or accessory or not at all; and in this connection, the fact that principals may be conspirators is immaterial."].)

And, as explained by our state high court, the natural and probable consequences doctrine constitutes a type of aiding and abetting. "[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' " (*McCoy*, *supra*, 25 Cal.4th at p. 1117, quoting *Prettyman*, *supra*, 14 Cal.4th at p. 260.) This has been the law in California for over a century, since our

state high court embraced the natural and probable consequences doctrine of aiding and abetting in *People v. Kauffman* (1907) 152 Cal. 331, 334 (*Kauffman*). (See *Prettyman, supra,* 14 Cal.4th at pp. 260-261.)

In addition to section 31, which, as noted, has defined a "principal" to include an aider and abettor since 1872, and *Kauffman*, which, as noted, has embraced the natural and probable consequences doctrine of aiding and abetting since 1907, we find section 971. As pertinent, section 971 has substantively stated, from 1872 onward, that "all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals . . . ." (See *Bompensiero v. Superior Court* (1955) 44 Cal.2d 178, 186 ["Reasonably construed, [the former substantively similar section 971] expresses a legislative intent to abolish the distinctions made at common law as to the various types of participants in the commission of a crime and to make all of them subject to the same procedural and substantive limitations."].)

The point is, for over a century, the term "principal" in California criminal law has effectively included an aider and abettor under the natural and probable consequences doctrine. It is against this storied background that, in 1997, the Legislature used the unadorned term "principal" in the enhancement statute at issue here, section 12022.53(e)(1). The Legislature knew what it was doing in this regard; indeed, one might say the Legislature was standing on "principal." Consequently, an aider and abettor under the natural and probable consequences doctrine is a principal within the meaning of section 12022.53(e)(1).

Defendant concedes that one who *directly* aids and abets an offense is a "principal" under section 12022.53(e)(1)—i.e., one who, with *knowledge* of the perpetrator's unlawful purpose and with the *intent* of committing or facilitating the commission of the offense, by *act or advice aids* the commission of the crime. (*People v.*

Beeman (1984) 35 Cal.3d 547, 561.) Defendant argues, however, that this does not describe the aider and abettor under the vicarious liability theory of the natural and probable consequences doctrine.

An aider and abettor under the natural and probable consequences doctrine, though, must know of and intend to assist the perpetrator's target crime (or must commit the target crime himself), *and* the non-target crime must be a reasonably foreseeable consequence of that target crime. (*Prettyman*, *supra*, 14 Cal.4th at p. 261; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1583.) The natural and probable consequences doctrine is based on the recognition that " 'aiders and abettors should be responsible for the criminal harms *they have naturally, probably and foreseeably put in motion*.' " (*Prettyman*, *supra*, 14 Cal.4th at p. 260, italics added, quoting *People v. Luparello* (1986) 187 Cal.App.3d 410, 439.)

In *Gonzales*, *supra*, 87 Cal.App.4th 1, the Second Appellate District, Division Four, rejected an argument similar to the one defendant makes here concerning the culpability of an aider and abettor under the natural and probable consequences doctrine. In *Gonzales*, the defendant contended the section 12022.53(e)(1) enhancement violates federal due process because " 'it permits a non-gun-using defendant in a gang case who is convicted of first degree murder as the natural and probable consequence of a *simple assault*, to be sentenced more severely than a person guilty as an accomplice to first degree murder, and it permits this result *without any requirement that the jury find that the defendant knew or intended that the homicide be committed by the use or discharge of a firearm*.' " (*Gonzales*, at pp. 13-14, underscoring omitted, italics added.)

In rejecting this argument, the *Gonzales* court reasoned that section 12022.53(e)(1) "is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang"; and that "[defendant Gonzales's] argument is contrary to aider

and abettor jurisprudence in California. [As for aiders and abettors under the natural and probable consequences doctrine,] the only requirement is that the aider and abettor intend to facilitate the target offense and that the offense ultimately committed is the natural and probable consequence of the target offense." (*Gonzales, supra*, 87 Cal.App.4th at p. 15.) *Gonzales* also emphasized the harm at which this enhancement was directed: "The Legislature has chosen to severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms." (*Id.* at p. 19.)

Through this reasoning, *Gonzales* recognized that the section 12022.53(e)(1) enhancement—by incorporating the criminal street gang finding of section 186.22, subdivision (b) as a required element—applies in the aiding and abetting context only to an aider and abettor of an enumerated serious felony *who does so for the benefit of a criminal street gang* and *with the specific intent to further criminal conduct by gang members*. (§§ 12022.53(e)(1)(A), 186.22, subd. (b)(1).) (The jury made these gang findings with respect to defendant's attempted murder conviction.)

Citing *Gonzales* approvingly, our state Supreme Court, in *People v. Garcia* (2002) 28 Cal.4th 1166, concluded, in a drive-by gang shooting case, that "the Legislature has expressed its clear intent to punish aiders and abettors" pursuant to the enhancement under section 12022.53, subdivisions (d) and (e)(1), even where, as in *Garcia*, the shooter was acquitted of all charges. (*Garcia*, at pp. 1173, 1170.)

In light of the long-standing recognition in California law that aiders and abettors are principals and that those acting under the natural and probable consequences doctrine are aiders and abettors, and given that the section 12022.53(e)(1) enhancement is directed at the serious gang firearm threat in California, we conclude that the term "principal" in

the section 12022.53(e)(1) enhancement includes aiders and abettors under the natural and probable consequences doctrine. [END OF PUB. PT. III.]

IV. The Trial Court Did Not Err Prejudicially in Instructing that Perpetrators and Aiders and Abettors Are "Equally Guilty"*

Defendant contends the trial court erred prejudicially by instructing the jury with a prior version of CALCRIM No. 400, which stated that "[a] person is *equally guilty* of the crime whether he . . . committed it personally or aided and abetted the perpetrator who committed it." (CALCRIM No. 400 (June 2007 rev.), italics added.) Given the context of the trial here, we do not find prejudicial error.

In "some extraordinary circumstances" (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 851), this "equally guilty" instruction may be misleading (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165). This is because an aider and abettor may have a greater, or a lesser, culpability than the direct perpetrator, depending on whether these joint participants have different defenses or extenuating circumstances available to them, or whether their individual mental states differ. (*People v. Yang* (2010) 189 Cal.App.4th 148, 155; see *McCoy*, *supra*, 25 Cal.4th at p. 1114; *Canizalez*, *supra*, 197 Cal.App.4th at p. 851; *Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.) For this reason, the word "equally" has been omitted from CALCRIM No. 400 (Apr. 2010 rev.).

"Extraordinary circumstances," however, were not part of the trial here because issues of distinct defenses, extenuating circumstances, or mental states among joint participants were not involved.

Furthermore, the prosecution's main theory at trial was that defendant was an aider and abettor under the natural and probable consequences doctrine. Against a

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* See footnote, *ante*, page 1.

similar backdrop, the *Canizalez* court had this to say about the "equally guilty" instruction: "Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be 'equally guilty' with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime [assuming, as is the case here, that no distinct defenses or extenuating circumstances among joint participants are involved]." (*Canizalez*, *supra*, 197 Cal.App.4th at p. 852.)

We conclude the trial court did not err prejudicially by instructing with the "equally guilty" language of the prior version of CALCRIM No. 400.

V. The Trial Court Did Not Err Prejudicially in Failing to Instruct on Self-defense or on Attempted Voluntary Manslaughter*

A. Trial Court's Refusal to Instruct on Self-defense

Defendant's main theory at trial was that neither he nor any of his confederates fired any shots; instead, one of the rival Norteños gang members shot Christopher Smith. If the jury did not agree with this theory, though, defense counsel asked the trial court to instruct on self-defense as a "back-up" defense. The trial court refused, finding the evidence insufficient to support this defense. Defendant contends the trial court, in so refusing, erred prejudicially and denied him his constitutional right to present a defense. We disagree.

"[T]he trial court need give a requested instruction concerning a defense only if there is substantial evidence to support [it]." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267.) " ' "Substantial evidence is evidence sufficient to 'deserve consideration by

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* See footnote, *ante*, page 1.

the jury,' that is, evidence that a reasonable jury could find persuasive." ' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) The failure to instruct on a defense is state law error—i.e., reversal is warranted only if it appears reasonably probable the defendant would have fared better had the error not occurred. (See *People v. Randle* (2005) 35 Cal.4th 987, 1003 (*Randle*), overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

One acts in self-defense when he actually *and* reasonably believes he must defend himself from imminent danger of death or great bodily injury. (*Randle, supra*, 35 Cal.4th at p. 994.)

As noted, defendant's main theory at trial was that the shooter was a Norteño, not a Sureño acting in self-defense.

At trial, defendant did testify that as he drove out of the parking lot, Pascual ran after his truck from 55 to 60 feet away, while holding a gun at his waist. Defendant testified he did not slow down, he was "panicked," and his friends were screaming to step on the gas because "[Pascual] has a gun." Two independent witnesses (Juan Trejo and Carlos Chitiva) testified they saw a man chasing defendant's truck, holding one hand in his waistband while cursing. And a few other witnesses saw Pascual, at some point, retrieve what apparently was a gun from his SUV.

However, defendant did not state in his police interview what he self-servingly testified to at trial regarding self-defense, even though the interviewing officer asked if defendant had seen anyone with a gun or anyone shooting, impliedly referring to the Norteños. In fact, in that interview, after repeatedly denying that anyone had fired shots from his truck, defendant relented and said one of his passengers ("Cornejo") had fired at the Norteños. Defendant added that he grabbed Cornejo's arm and hit him, *trying to stop the firing*. And defendant further noted that when they returned to defendant's house,

defendant *confronted* Cornejo about the shooting. These highlighted actions are hardly consistent with acting in self-defense.

The point is that defendant was the pivot about which the defense of self-defense revolved. And defendant was all over the self-defense map, barely relying on it in any event. Even if we assume that the trial court should have instructed on self-defense, it is not reasonably probable that defendant would have fared any better had the trial court done so.

For these same reasons, the trial court, in refusing to instruct on self-defense, did not prejudicially violate defendant's constitutional right to present a defense.

B. Instruction on Attempted Voluntary Manslaughter

Defendant also claims the trial court erred prejudicially in failing to instruct the jury, on the court's own initiative, on attempted voluntary manslaughter as a lesser included offense of attempted murder, based on imperfect self-defense or on heat of passion. Each of these bases negates the malice element required for attempted murder, dropping the offense to attempted voluntary manslaughter. (See *Randle, supra*, 35 Cal.4th at pp. 994-995.) We find no prejudicial error.

" ' "To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." ' " (*People v. Enraca* (2012) 53 Cal.4th 735, 758 (*Enraca*).)

Imperfect Self-defense

One acts with *imperfect* self-defense when he actually, *but unreasonably*, believes he must defend himself from imminent danger of death or great bodily injury. (*Randle, supra*, 35 Cal.4th at p. 994.)

For the reasons set forth above in our discussion of the trial court's refusal to instruct on "perfect" self-defense, we find no prejudicial error involving a failure to instruct on imperfect self-defense, even assuming there was substantial evidence to support the instruction. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 52-53 [the state law standard of harmless error of "reasonably probable" applies in this context].)

Heat of Passion

When one attempts to kill another under a heat of passion arising from a provocation that would have caused a person of average disposition to act rashly with intense emotion, the attempted killing may constitute attempted voluntary manslaughter because the heat of passion negates the malice element required for murder. (CALCRIM No. 603.)

Defendant argues that, in this case of rival gang confrontation, this "person of average disposition" standard (CALCRIM No. 603) "means the average gangster in the same situation, knowing what these gangsters knew." Defendant is mistaken. The standard "is not the reaction of a 'reasonable gang member.' " (*Enraca*, *supra*, 53 Cal.4th at p. 759.)

We conclude that the evidence of this gang confrontation prior to the shooting—comprising words, signs, the pushing of shopping carts, and perhaps some actual fighting—was not sufficient to provoke a person of average disposition, as opposed to a gang member, to act in a heat of passion of intense emotion so as to reduce an attempted murder to attempted voluntary manslaughter. (*Enraca*, *supra*, 53 Cal.4th at p. 759.) Consequently, the trial court did not err in failing to instruct on this theory. [THE REMAINDER OF THE OPINION IS TO BE PUBLISHED.]

DISPOSITION

The judgment is affirmed.[3] **(*CERTIFIED FOR PARTIAL PUBLICATION*)**

BUTZ, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.

[3] We deny defendant's request to take judicial notice that the Pimentels were charged separately from defendant with firearm discharge in this shooting. Defendant asserts these charges support his argument that there was substantial evidence of self-defense here. Defendant claims these charges were dismissed when defendant was sentenced.